IN THE

Supreme Court of the United States

No. **76-1054**

OCTOBER TERM, 1976

GIUSEPPE CATANZARO,
Petitioner,

-against-

CENTRAL GULF STEAMSHIP CORP.,
Respondent,

-against-

UNITED STATES OF AMERICA,
Third Party Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To The Honorable Chief Justice And The Associate Justices of The Supreme Court of the United States:

Your petitioner, Giuseppe Catanzaro, prays that a writ of certiorari issue to review an order of the United States Court of Appeals for the Second Circuit, entered on November 1, 1976, which affirmed a judgment of the United States District Court for the Southern District of New York dismissing petitioner's suit against respondent for personal injuries sustained as a seaman.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit has not as yet been reported, but a copy of that opinion is annexed hereto as Appendix A.

STATEMENT OF JURISDICTION

The statutory provisions believed to confer on this Court jurisdiction to review the order of affirmance in question is 28 U.S.C. #1254(1). Petitioner also claims that his rights to due process under the Fifth Amendment to the United States Constitution were violated when the District Court dismissed his suit and the Circuit Court affirmed such dismissal.

QUESTIONS PRESENTED

1. Did the Trial Court's derogatory comments pertaining to petitioner's expert witness create prejudicial error so that petitioner was deprived of a fair trial?

2. Did the Trial Court's refusal to permit petitioner to engage new counsel create a prejudicial abuse of discretion which deprived petitioner of due process and the right to effective counsel of his own choice?

3. Did the continuous remarks and appeals to passion and prejudice by respondent's counsel throughout the trial so poison the minds of the jurors that petitioner was deprived of a fair trial?

4. Did the bias manifested by the Trial Court against petitioner and his counsel throughout the trial so prejudice and influence the minds of the jurors that petitioner was deprived of a fair trial?

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

United States Constitution Amendment V:

"No person shall . . . be deprived of . . . property without due process of law . . ."

46 United States Code #688:

"Recovery for injury to or death of seaman

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

STATEMENT OF THE CASE

Petitioner, Giuseppe Catanzaro, a seaman, appealed from a judgment entered against him after trial by jury in the United States District Court for the Southern District of New York (Levet, J.), on February 10, 1976, dismissing his complaint against respondent Central Gulf Steamship Corp. for personal injuries under the Jones Act, cited as 46 U.S.C. #688.

The Court of Appeals for the Second Circuit (Moore, Anderson and Gurfein, JJ.) affirmed the dismissal.

Petitioner has been a seaman (rating-ordinary seaman) for many years, first starting to sail in 1944 during World War II (28).[1] His last employment was in 1970 aboard the S.S. Green Forest, owned and operated by defendant Central Gulf Steamship Corp. At that time his approximate wage was $13 per day.

His final ill-fated voyage commenced late in September 1970 when the Green Forest departed from California laden with ammunition for American combat soldiers in Vietnam.

The ship reached its destination, Port of Cam Ranh Bay in Vietnam, on October 25th when it docked at Pier 5.

On October 31st at 12:35 P.M. the ship completed its task of unloading (470) 2,094 tons of ammunition at Pier 5 (488). Although the job was done the ship remained at dock. At the same time another ammunition carrier, the S.S. Robin Grey, was docked at the same pier (377).

Thereafter at approximately 2:40 P.M. two incoming rockets landed on a road about 2 1/2 miles away from the pier according to an entry in the log book of the Port Transportation Command (391-393). As a result it appears that the command termed this to be an emergency due to enemy attack (382). However, there is no independent testimony in the trial record establishing that these two rockets were fired by the enemy or from hostile sources. Nor is there evidence of any other enemy action against the Green Forest or in the vicinity thereof.

In any event the Harbor Master instructed John Waddell, a harbor pilot, to get the ammunition cargo ships

1. References to pages of stenographic trial minutes; also in Appellant's Appendix below.

out of the Port because of an attack (366). Accordingly, Waddell boarded the Green Forest and told the ship captain to get under way and out of the harbor (366-367). Although he was giving orders from the bridge (372, 394) the captain still was in command of the ship, including the unmooring, and Waddell was there "strictly as an advisor" (402).

At the same time a tugboat was dispatched to Pier 5 to assist the Green Forest with the unberthing (496).

Meanwhile Catanzaro was off duty, asleep in his bunk at 3:00 P.M. (48) when he was awakened by the chiefmate and told to get on deck to help undock the ship (115-116). He rushed out to the bow and was ordered by the second mate (Mr. Friend) to take in the starboard mooring lines so that the ship could leave the dock (36, 49). Friend was the officer in charge of the seamen who were taking in the lines at the bow (453, 470).

When Catanzaro came on the scene Moses Jackson (a fellow seaman) was taking in the starboard lines (50) and shortly thereafter all lines were in except the springline which is the last line to be removed because it acts to spring the ship away from the pier (51, 374). Jackson and Catanzaro were the only ones working on the springline.

The far end of the springline was tied to the pier (103, 461) and the near end to a bitt on the fore-deck (121). In order to take this line in, the near end was taken off the bitt and turned on the drum attached to the windlass (104, 121). Jackson turned the springline on the drum and made three turns (121) at which time the windlass was operating and the line was being taken in (122). However, he was ordered to put two more turns of line on the drum by Friend thus making five turns in all (123, 485).

As the drum rotated the springline was being taken in and Jackson while standing behind the drum was taking the line from the drum (104). Catanzaro was standing behind Jackson and taking the incoming line from him

thereby coiling it on the deck (105).

While the springline was thus being hauled in and coiled, the free end (called the eye) was down in the water (461) being dragged through the water from the pier toward the ship. However, when the tugboat arrived to assist the Green Forest the springline was dragged across the bow of the tug (499).

The forward-most part of the bow is equipped with a king post called a cruciform bitt. Unhappily as the springline was dragged across the bow of the tug, the eye of the line got caught on and was snared by this king post (499, 505). When the eye was snagged by the post there "was a sudden strain" (501) observed and felt by the tugboat captain who actually saw the springline stuck there and declared that was a dangerous situation (505).

When the eye-end of the springline got caught on the tugboat, there was an instantaneous reaction on the windlass-drum at the other end of the line. The free movement of the line onto the drum stopped, it started to smoke and it resisted the drum (182-183, 195, 208-209) and it tightened up (207). It became extremely taut (466).

At the same time the loose end of the line (the tail) being taken off by Jackson and coiled by Catanzaro "whipped backwards and forwards" with a violent "backlash" (181). This caused the line to fly out of their hands (207) and whipped them both (208). The line hit Jackson on the head and knocked him against the winch drum (182) while petitioner was hit in the leg and thrown in the air; he literally "flew up in the air and turned over a couple of times and then landed on his back." (180).

Immediately thereafter the eye-end of the line went slack and became disengaged from the tugboat (501). Jackson was not seriously hurt and continued with the job of hauling in the springline (215) but petitioner was severely injured and had to be moved (215, 468).

He was taken to 483 United States Air Force Hispital where he was placed in balanced suspension. Catanzaro was thus hospitalized for approximately three weeks when he was placed in a spica cast and transported by air vac to U.S. Public Health Service Hospital in San Francisco for surgery.

His injury was classified as a comminuted fracture of the right femur which required surgery consisting of open reduction and internal fixation with insertion of an eighteen inch long intramedullary nail and a bone graft from his right iliac crest for placement around the fracture site.

After remaining in the California hospital for approximately one month Catanzaro was sent home and classified as "not fit for duty."

Almost three years later in July 1973 the eighteen inch nail was finally removed by further surgery at which time Catanzaro was still classified as "not fit for duty."

To current date petitioner is "not fit for duty" and permanently disabled.

The jury returned a special verdict in favor of the respondent finding that Catanzaro did not prove that the respondent shipowner was negligent in the conduct of the unmooring operation and also did not prove that the Green Forest was unseaworthy.

In affirming the dismissal the Circuit Court held as follows:

> ". . . we are satisfied that the defendant-appellant suffered no prejudice either by reason of the trial judge's remarks, made in the course of the trial, about appellant's counsel and his witness Mr. Boulalas. While *the remarks were slightly more caustic than are customary*, they were made in an effort to keep the trial moving." (emphasis added)

REASONS FOR GRANTING THE WRIT

I. THE TRIAL COURT'S DEROGATORY COMMENTS PERTAINING TO PETITIONER'S EXPERT WITNESS CREATED PREJUDICIAL ERROR

The issues of negligence and unseaworthiness at the trial below were of paramount concern to petitioner's suit for substantial damages.

In this connection he presented Angelos Chris Boulalas a master mariner with impressive credentials who spent ten years at sea of which nine years were as master of oceangoing vessels, and who now is a marine surveyor and maritime arbitrator (223-224).

The expert witness gave the following opinions:

1. It was bad seamanship not to have an operator in charge of the windlass (267).

2. It was bad seamanship not to have an officer observe the eye of the springline at all times while it was being hauled through the water (268).

3. it was bad seamanship not to give an order to stop the windlass motor at the time of the accident (268).

4. An unmooring party of three men was insufficient (270).

5. Failure to warn unmooring party that tugboat was in vicinity was bad seamanship (271).

6. Failure to warn unmooring party that no one was operating windlass was bad seamanship (271-272).

7. The order of the second mate to put five turns of the springline around the drum under the conditions described was bad seamanship (276).

The Trial court right from the start began to erode the status of Captain Boulalas by utilizing sarcasm as follows in criticizing his testimony (225):

> "I didn't understand it then. It wasn't clear. The question now is ha. this witness, *this proposed expert*, read the testimony." (emphasis added)

Then again as follows (227):

> "Well, go ahead, will you, do something so we can get on with this case."

Then the court unfairly seeks to impede the testimony by inviting opposing counsel to object (228):

> "Is there no objection to this, Mr. Healey?"

Then the following unfair characterization of an exhibit (228):

> "Exhibit 6 is in evidence, whatever it is. All right, what else, counsel?"
>
> "Exhibit what?" (228)
>
> "Reports of what? (228)"
>
> "Well, that is meaningless." (228)
>
> "Exhibit what?" (229)

Again the court openly invited opposing counsel to object (232):

> "Not that one. All right. This will have to be sustained then, the objection, if it is made."

However, without embarrassment counsel refused the invitation by answering as follows (232):

> "Not yet, your Honor."

Again another invitation to counsel (234):

> "Now, is there any objection to his expertise, gentlemen?"

Again directing a caustic comment as to the questioning (234):

"Yes. Sustained. I don't know what dangerous conditions are."

When the witness testified to a war experience in Argentina (235) the court testaly inquired (236):

"What war was that?"

Returning to invitations to object (249):

"Wait. That will never do. There is bound to be an objection."

Again on the same page (249):

"That is what I just said not to do, and counsel, do you object to that, sir?"

"That is out of order." (250)

And now at the bottom of page 250 the court seeks to indicate that Boulalas was selling his testimony as follows:

"You're paying for him. Or, your client is."

Then counsel is embarrassed with the following question from the court (251):

"Do you want to withdraw this witness now, sir."

Then the court actually made the following comment to counsel in front of the jury (251):

". . . That is out of order and naturally there will be an objection. I am merely saying what some of those stumbling blocks are before you, but, I don't seem to get much help about it from you."

In the same vein (253):

"All right, go ahead with your question *if you can.*" (emphasis added)

When counsel sought to question his expert witness about the behavior of Second Mate Friend, the court stopped him with the following unfair, prejudicial statement (261):

"He didn't do anything at all."

And two lines later:

"There is no proof that he did anything. He was there."

And now in an attempt to hurry counsel at page 262:

"Well, it's taking a lot of time, but go ahead. See if you can't reduce it to a simpler question."

When counsel speaks about five turns around the winch, the court interrupts and says (262):

"The drum of the winch."

When counsel obeys the court and corrects his statement to drums of the winch the court comes right back with the following erroneous interruption (262):

"I don't know whether that it is shown whether there was any order that he put four or five turns . . . ."

And to Boulalis the court ungraciously snaps as follows (263):

"Now wait, Mister, until he finishes the question. Don't pop up yet. Finish your question, won't you counselor."

When Boulalis sincerely stated he could not answer a question with one word, the court chided him as follows (265):

"Well, take two words, or however many you think are necessary without making a long speech."

Again the court belittles the stature of the expert witness by the following (265):

"Yes, the objection is sustained. Counselor, how can you expect to take the testimony of an expert if he himself can't boil it down to answering a question which you yourself posed?"

Again the following salutation by the court (266):

> "Wait a minute now. Wait a minute, *Mr. Expert.*" (emphasis added)

And this time (280):

> "All right. Just calm down. Counsel has a right to cross-examine you, and you are not—"

On redirect examination of Boulalas petitioner's counsel said he had a couple more questions. The court then seriously directed as follows (303):

> "All right. Two questions, that's what a couple means."

The court then prejudicially took upon itself the task of forcing counsel to admit that the unmooring experience took place under circumstances which were not normal as follows (303):

> "You don't call these normal, do you?"

When counsel answered no, "I said abnormal", the court followed up with (303):

> "Oh, abnormal. All right. Now, what is your question?"

The question of normal as against abnormal was a question for the jury and the court's treatment of same, as indicated, was prejudicial error.

At the bottom of page 303 the court concludes with the following:

> "Now, your second question, because you had one."

Then as follows (312):

> "I will stay here another 15 minutes, but then I'm going to adjourn for the day. I'm not going to go on with this kind of a fallacy."

Later in the absence of the jury the court made the following indiscrete remark pertaining to Boulalas (319):

> ". . . with respect to the testimony of the Greek so-called expert . . ."

Although, this remark was not made in the presence of the jury, it still manifests the bias and hostility of the trial court to Boulalas as a person and also as an expert witness.

It is somewhat perplexing to recognize that the trial court repeated these prejudicial remarks in a more severe manner to the jury during the court's charge just before jury deliberation when it was most susceptible to influence by a learned court.

At the bottom of page 607 and top of 608 the court charged the jury as follows:

> "Then the plaintiff produced one Angelos Chris Ballolous, *apparently a Greek, as a so-called expert.* He has been a master mariner, as he testified, he mentioned his grades. He is presently a marine surveyor and maritime arbitrator, I think he said, and a maritime arbitrator as I understand it would be called upon to determine the value or the damage sometimes when there are two ships which collide. You heard his qualifications." (emphasis added)

This charge was a blatant but effective attempt to destroy the status of Boulalas and thereby also petitioner's case. This ploy appears to have been successful since the jury brought in a verdict against Cantanzaro.

Referring to Boulalas as *"apparently a Greek"* was an insensitive, officious ethnic slur pandering to the lowest instincts of the jurors. Furthermore, calling him a *"so-called expert"* was an official sanction from the "awesome" might of the judiciary practically certifying that Boulalas was no expert at all. This characterization coming from and with the authority of the court had to have a baleful, prejudicial effect upon the minds of the jurors.

A recent similar blurb by a high public official created

such adversity that a presidential cabinet member was caused to resign his office.

Furthermore, the Court's unwarranted, irrelevant remark that Boulalas is now only an arbitrator who is called upon to adjust collision claims is a nefarious invitation to the jury to disregard his expertise in this case. It was a direct sabotage of petitioner's case. It should not be countenanced by this court. The only proper reaction is a granting of this writ and a reversal upon subsequent full review.

Although the judge in a federal trial has great latitude in his remarks to the jury, there still is a standard for judicial restraint.

The judge should be cautious and circumspect in his language and conduct before the jury. See *Travelers Ins. Co. v. Ryan*, 416 F.2d 362, and *Myers v. George*, 271 F.2d 168.

He should say or do nothing which will prejudice the rights of a party. See *Butler v. United States*, 317 F.2d 249, cert. den. 375 U.S. 836, 838, and *Ward v. Booth*, 197 F.2d 963. He should also refrain from any remarks calculated to influence the minds of the jury. *Quercia v. United States*, 289 U.S. 466, 470, and *Starr v. United States*, 153 U.S. 614.

Even if counsel fails to make objection to these prejudicial remarks the appellate tribunal will reverse if the errors are obvious and seriously affect the fairness of the trial. See *United States v. Socony-Vacuum Oil Company*, 310 U.S. 150, 239, and *United States v. Atkinson*, 297 U.S. 157.

It is of paramount concern to notice that the Circuit Court in its decision herein gave some indication that the Trial Judge was intemperate in his choice of language.

In this connection the Circuit Court stated that Judge Levet's "*remarks were slightly more caustic than are*

customary." (emphasis again added)

This is a clear imputation the Court recognized that the Trial Court was wrong. It cannot reasonably be viewed any other way. However, the Court sought to excuse his behavior by stating that the comments "were made in an effort to keep the trial moving."

It is respectfully submitted that a litigant's constitutional rights are superior to mere expediency in the conduct of a trial.

It is somewhat frustrating to note that the same appellate tribunal previously sought to justify similar outbursts by Judge Levet.

In the case of *DiBello v. Rederi A/B Svenska Lloyd*, 371 F.2d 559 (2d Cir. 1967) a longshoreman's suit for personal injuries was dismissed and on appeal he urged that the same Judge Levet denied him a fair trial because the Court failed to preserve an atmosphere of impartiality by its use of prejudicial language.

The Circuit Court in affirming the dismissal held as follows at page 561:

> "If, on rare occasion, *Judge Levet's remarks might better have been left unsaid*, they were but separate and isolated instances, insufficient to contaminate the free air of an impartial tribunal or to necessitate reversal." (emphasis added)

Thus, Judge Levet's bias is so ingrained that it hasn't changed a single whit over the intervening period of ten years. And yet the same Circuit Court is there to recognize his behavior and explain it rather than correct it and, thus, preserve the constitutional rights of those unhappy seamen who have the misfortune of being required to prosecute their meritorious claims in his forum.

Petitioner respectfully submits that Judge Levet has a reputation for being somewhat antagonistic to seamen and their claims for personal injuries.

Although such reputations are not scientifically ascertainable, they do exist and are recognized by the people who regularly appear in the various district courts throughout the land. See Joseph C. Goulden, *The Benchwarmers*, pp. 114-157 (Weybright and Talley, N.Y. 1974).

In the face of Judge Levet's apparent bias and the two separate cases wherein the Circuit Court felt compelled to publicly excuse and explain his habit, it is respectfully submitted that petitioner was not afforded due process below.

II. THE TRIAL COURT'S REFUSAL TO PERMIT PLAINTIFF TO ENGAGE NEW COUNSEL WAS A PREJUDICIAL, ABUSE OF DISCRETION

On the second day of trial petitioner was 45 minutes late for court (56). As a result he was interrogated rather sharply by the trial judge in chambers (56-59). Petitioner was warned that a recurrence would result in his paying "some money to the court and to these lawyers" or that his "case is going to be dismissed." (59)

Catanzaro then advised the judge that he dismissed his lawyer and wanted to hire a new attorney (59). The court refused to allow him to do that and told Catanzaro he must continue with his attorney (60). However, the court acceded to opposing counsel's suggestion that the matter be placed on the record (61).

Petitioner wanted to discharge his attorney because they had an "argument" and the lawyer "flared up and shouted at him", and that he generally lost confidence in his attorney. (62-65)

Although the court was concerned about Catanzaro's complaints (70) it denied his application. However, the

court said it would permit him to change attorneys only upon the condition that he pay the sum of $2,500 to respondent's attorneys and additional sums to the U.S. attorney (74).

Since petitioner is an indigent seaman he could not make these payments and was compelled to continue with an unwanted attorney.

Although petitioner recognizes that his application was a discretionary matter, it is respectfully submitted that the denial of same and the imposition of oppressive monetary conditions were abuses of judicial discretion sufficient to warrant reversible prejudicial error.

The right to counsel is a highly regarded concept. Where a client loses confidence in his attorney, he should not be compelled to continue the attorney-client relationships. See *Deauville Corp. v. Garden Suburbs G & C Club*, 60 F.Supp. 72.

The Circuit Court classified the attorney-client relationship herein as merely "a personality conflict between them." This was completely inaccurate. Petitioner for proper cause recognized that his counsel was ineffective and a reading of the entire trial record certainly bears out that contention.

Under such circumstances petitioner should not have been coerced into proceeding with his unwanted trial counsel.

The Circuit Court further compounded this vital issue by interjecting that petitioner "had already once changed his counsel earlier in the proceedings." Such dicta is a complete irrelevancy and has nothing whatsoever to do with the issue. But since it is relied upon by the Circuit Court in its decision it must be regarded as a further proof of denial of due process.

III. THE CONTINUOUS PREJUDICIAL REMARKS BY RESPONDENT'S COUNSEL THROUGHOUT THE TRIAL CONSTITUTE PREJUDICIAL ERROR

Respondent's counsel, Thomas Healey, in his zeal to "win" his case made continuous prejudicial remarks throughout the trial. It is respectfully submitted that such conduct constituted constitutional error.

This pattern began with his opening statement to the jury (11-21).

His entire opening statement actually was an improper summation which normally follows at the close of the trial.

He started by telling the jury the accident was an enemy armed attack whereby the Viet Cong were dropping rockets on plaintiff's ship (12). This was his testimony and was not established at the trial.

He also exhorted that enemy rockets were being directed at the Green Forest (12). Again only his word and no proof. However, he does tell the jury that he knows that from official army records (13). This, too, was not so and was only said to give authenticity to his "speech". He further compounds his vivid testimony by stating falsely that the crew members were sitting on the Green Forest and *seeing* the enemy forces attempting to blow up their ship. Those guys were going to get killed he says (13). They also see people shooting at them. He delivers a wild, unsubstantiated claim that "these guys had 14 minutes to get out of there"(13). Again not true.

He paints a bleak picture of petitioner in the opening statement by telling the jury that Catanzaro fought to get the job on the Green Forest because of the extra pay (15). He told the jury Catanzaro was "hungry for the money." (16) He castigates Catanzaro for being a grubby volunteer who now wants to "sue". (16) Because of this he says give

the respondent "a fair shake". (21) He doesn't mention that Catanzaro's base pay is $13 a day (30).

Counsel continued this behavior throughout the trial right into his closing summation to the jury.

He tells the jury as a legal argument that Catanzaro "pocketed" his $200 bonus (549) which was "big bonus money." (551). He calls Catanzaro a "sunshine sailor" and a "weekend patriot" (551).

Counsel prejudiced and poisoned the emotions of the jurors when he declaimed that Catanzaro "has a very favorable pay scale" and is "a lot better off than the soldiers who have come back with a bullet in them and no big bonus." (555) The lawyer also has the union upstaging the army by insisting "on big bonus money" and fancy "shore privileges" (555-556).

By now Healey has warmed himself to his vicious, prejudicial zealous endeavors and tells the jury "Catanzaro who's having trouble with the line" needed McCoy's help (564). Healey plants another evil seed by saying "Catanzaro wasn't doing his job right." (564)

The ultimate damage was when the court denied petitioner's objection and said "the jury will determine what the proof was." (565)

Healey even falsifies the trial record when he blandly tells the jury that Catanzaro wasn't even coiling the line (565). Healey won't let go then says Catanzaro "was getting himself fouled in the lines and needed help." (568) He tells the jury to "look at his conduct" and implies that Catanzaro was doing "a terrible thing." (568) Then with an ugly charitable spirit he piously says to the jury well lets excuse Catanzaro because "he too was under pressure." (568)

Although counsel has certain discretionary liberties in arguing his cause, he cannot engage in prejudicial, inflammatory tactics abhorent to the other party. See *Marron*

v. Atlantic Refining Co., 176 F.2d 313; *Palmer v. Miller*, 145 F. 2d 926, and *Twachtman v. Connelly*, 106 F.2d 501.

The petition should be granted because of counsel's conduct.

IV. THE TRIAL COURT MANIFESTED PREJUDICIAL BIAS AGAINST PETITIONER AND HIS COUNSEL THROUGHOUT THE TRIAL

In addition to the conduct claimed in *Point I* of this petition it is respectfully urged that other prejudicial conduct of the trial court merits consideration herein for granting of the writ in favor of petitioner.

Throughout the trial the court favored respondent over petitioner and his counsel.

Right at the start during opening statements to the jury, the court hurled what at first appeared to be a routine admonition. The Court said to petitioner's counsel as follows (4):

> "Please you let your voice fall."

The court then showed its first petulant disfavor by remarking as follows at the end of said opening statement (11):

> "All right, that was a pretty long summation, counsel."

Like comments continued on pages 34, 37, 38, 44, 54, 92, 97, 109 and 136 and then throughout the trial record.

The court continuously invited respondent's counsel to object to questions when no objections were first advanced.

This pattern continued right through final summations to the jury.

While the court began the trial with the admonition for petitioner's counsel to keep his voice up (4) it concluded by telling counsel as follows (576):

> "You don't need to raise your voice, counsel."

At this point when counsel mentioned the earlier admonition, the court retorted as follows (576):

> "Don't lower it."

The court continually broke into counsel's argument to the jury as follows (577):

> "This is hardly rebuttal, counselor."

Again as follows (538-539):

> "Listen, there is no proof about that at all, counselor. That is pure speculation. Disregard it, members of the jury."

Once more (541):

> "Well, there is no evidence about that. You are constantly getting into speculation. Please stop it. Disregard these speculative statements."

On the same page:

> ". . . No more remarks like that, counselor, please."

At one point counsel sought to quote a "famous saying" from a case when the court broke in as follows (541):

> "No, don't quote cases at all, counsel. This is a matter of law. It is irrelevant here. This case depends upon the facts as shown."

When counsel then merely said "danger compels precaution as Justice Holmes said," the court spoke as follows (543) to the jury:

> "Disregard that, members of the jury. The court will charge you on the law."

When counsel tried to explain that was only a speech, the court answered (543):

> "Well, it is law. It is out of some Supreme Court Justice.".

At the end the court actually belittled plaintiff's case as follows (545):

> "Yes, it is the only day for the defendant, too, so get on with this, please. Come to a conclusion."

It is respectfully submitted that the court exceeded all proper comment and the writ should be granted. See the cases cited in Point I of this petition.

CONCLUSION

Upon the foregoing this Court should grant the writ on the ground that the Circuit Court by affirming the judgment dismissing petitioner's suit for personal injuries has sanctioned the trial court's departure from the accepted and usual course of judicial proceedings to such an extent that due process has been denied, and such affirmance, thereby, calls for an exercise of this Court's power of supervision.

Respectfully submitted,

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APPENDIX A—ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, AFFIRMING JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DISMISSING PETITIONER'S SUIT AGAINST RESPONDENT FOR PERSONAL INJURIES AS A SEAMAN

For The
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the first day of November one thousand nine hundred and seventy-six.

Present:

Honorable Leonard P. Moore,
Honorable Robert P. Anderson,
Honorable Murray I. Gurfein,
Circuit Judges.

GIUSEPPE CATANZARO,
Plaintiff-Appellant

v.

CENTRAL GULF STEAMSHIP CORP.,
Defendant and Third
Party Plaintiff-Appellee

v.

UNITED STATES OF AMERICA,
Third Party Defendant-Appellee

Docket Number 76-6054

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is AFFIRMED.

After a study of the record we are satisfied that the defendant-appellant suffered no prejudice either by reason of the trial judge's remarks, made in the course of the trial, about appellant's counsel and his witness Mr. Boulalas. While the remarks were slightly more caustic than are customary, they were made in an effort to keep the trial moving. Likewise, the portions of defendant's counsel's opening and closing statements, which were claimed to be inaccurate by the appellant, were not harmful in the light of the court's instruction that they were not evidence in the case.

There was no abuse of discretion on the part of the trial judge in refusing to permit the appellant to take time out to change counsel because of a personality conflict between them, as the appellant had already once changed his counsel earlier in the proceedings. The trial judge was correct in denying the requested *res ipsa loquitur* charge, and the appellant's other claims have no merit and require no discussion.

s/ Leonard P. Moore
Leonard P. Moore

s/ Robert P. Anderson
Robert P. Anderson

s/ Murray I. Gurfein
Murray I. Gurfein
Circuit Judges.

November 1, 1976.

APPENDIX B—COPY OF DISTRICT COURT JUDGMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GIUSEPPE CATANZARO

Plaintiff

-against-

CENTRAL GULF STEAMSHIP CORP.

Defendant and
Third Party Plaintiff

-against-

UNITED STATES OF AMERICA

Third Party Defendant

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73 Civil 672 (RHL)

JUDGMENT

The issues in the above entitled action having been brought on regularly for trial, before the Honorable Richard H. Levet, United States District Judge, and a jury, on January 27, 28, 29, 30 and February 3, 1976, and the Court having submitted the attached special questions to the jury, and the jury having answered the said special questions, and the jury thereafter having returned a verdict in favor of the defendant. Defendant having moved to dismiss the claim over against third party defendant, and the Court having granted the said motion, and the Court having directed the Clerk to enter judgment, it is,

ORDERED, ADJUDGED and DECREED: That defendant CENTRAL GULF STEAMSHIP CORP., have judgment against plaintiff GIUSEPPE CATANZARO, dismissing the complaint, with costs to be taxed, and it is further,

ORDERED: That the third party complaint be and it is hereby dismissed, without costs. The issue of maintenance and cure to be decided by the Court.

Dated: New York, N.Y.
February 10, 1976

s/ Raymond F. Burghardt
Clerk

APPROVED:

s Richard H. Levet
U.S.D.J.

Bill of Judgment in the sum of $478.32, as against plaintiff, and added to the Judgment.

Feb. 11, 1976.

s/ Raymond F. Burghardt
CLERK

IN THE

Supreme Court of the United States

October Term, 1976.

No. **76-1054**

GIUSEPPE CATANZARO,
Petitioner,

against

CENTRAL GULF STEAMSHIP CORP.,
Respondent,

against

UNITED STATES OF AMERICA,
Third Party Respondent.

Brief of Respondent in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

DANIEL L. STONEBRIDGE
Attorney for Respondent
19 Rector Street
New York, N. Y. 10006
(212) 943-3520

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In the

Supreme Court of the United States

No.

October Term, 1976.

Giuseppe Catanzaro,

Petitioner,

against

Central Gulf Steamship Corp.,

Respondent,

against

United States of America,

Third-Party Respondent.

Brief of Respondent in Opposition to a Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

To The Honorable Chief Justice and The Associate Justices of The Supreme Court of The United States:

This petition seeks review of the unanimous decision of the United States Court of Appeals for the Second Circuit, which affirmed a judgment of the United States District Court for the Southern District of New York, based upon a jury verdict, dismissing the petitioner's suit for personal injuries.

Questions Presented.

The question presented is whether, under Rule 19 of this court in a dispute between private parties of no constitutional or statutory import, should this court intervene particularly where the petition herein mirrors the brief submitted by the petitioner to the Second Circuit Court of Appeals.

Constitutional Provisions and Statute Involved.

The quotations by the petitioner of portions of the United States Constitution Amendment V and 46 United States Code #688 are not apropos. Neither is at issue in this suit.

Statement of the Case.

The SS GREEN FOREST, owned by the respondent, under charter to the United States of America left the west coast of the United States with a full cargo of ammunition for Viet Nam to be discharged there at the direction of the military command in that country. The vessel arrived and docked in Cam Rahn Bay at the ammunition pier as directed by the military. The portion of the cargo destined for Cam Rahn Bay was discharged by about noon on October 31, 1970, and the vessel remained at the pier awaiting orders from the charterer.

At approximately 2:40 P.M., the harbor master declared an emergency due to incoming rockets. He dispatched an army undocking pilot, Mr. Waddell, and an army tug under the command of Mr. Price with instructions immediately to remove the SS GREEN FOREST from the ammunition pier and head her down the channel. The army pilot boarded the vessel and ordered the Captain to unwarp the vessel and prepare for an immediate departure. The

army tug moved along side the SS GREEN FOREST awaiting the orders of the pilot. Mr. Catanzaro, a crew member of the SS GREEN FOREST, was directed to take in the vessel's starboard mooring lines. While the spring line was in process of being hauled on to the vessel the army tug moved in against the starboard bow of the SS GREEN FOREST to swing the ship in to the channel. The spring line which was moving across the forward portion of the tug momentarily snarled in a cruciform bitt of the tug causing the line to tauten and surge with a resultant backlash which injured Mr. Catanzaro. The third-party defendant, the United States of America, produced at the trial Mr. Waddell and Mr. Price. Mr. Price testified that he has worked with Captain Waddell on numerous occasions in Cam Rahn Bay and that on the day in question, he had observed two explosions in the vicinity of Piers 4 and 5, Pier 5 being the ammunition pier (TT 497). He, further, testified that during emergencies it was customary to start his tug ahead while a vessel's spring line was still moving across his tug. In normal circumstances, he would wait until the lines were clear (TT 503).

Apparently relying on this testimony as well as the balance of the testimony, the jury found that the accident was not caused by any negligence of this respondent or unseaworthiness of the vessel.

Reasons for Denying the Writ.

The petitioner argues that derogatory comments of the trial court pertaining to the plaintiff's expert witness and his counsel and prejudicial remarks of defense counsel constitute prejudicial error.

It is interesting to note that the trial consumed five full days of the court's time and a trial transcript runs some 640 pages. The petitioner has chosen to take certain comments of the trial court completely out of context without relating the circumstances in which they were made.

Concerning the plaintiff's "expert" the testimony of this witness commences at TT 223. His expertise had never been conceded by the defendant nor ruled upon by the court when at page TT 225 plaintiff's counsel commenced laying the ground work for a hypothetical question by referring to documents which were not in evidence and an exhibit which the witness had never seen. This caused the trial court to use the expression "this proposed expert." It is submitted that plaintiff's counsel's inept framing of questions and repeating questions upon which the court had ruled irked the trial court. Any remarks of the trial court were provoked by the conduct of plaintiff's counsel. It is of interest to note that no objections are found in the trial transcript to any remark made by the defendant's counsel in either the opening or the closing statements or his conduct of the trial.

It is important to note that in its charge to the jury, the trial court clearly stated:

> "During the course of this trial and during summations, anything that has been said by counsel or by the Court during these summations or during the course of the trial is not to be taken by you in place of your own recollection of the facts or the evidence. No comments by counsel or by the Court are evidence. You are to draw no inference from any such comments" (TT 583).

The court continued:

> "Nothing that the Court said is to be construed to indicate what your determination should be except, of course, that I expect you to follow these instructions which I am now giving you" (TT 584).

The petitioner also based his request for review on the trial court's refusal in mid-trial to permit the petitioner to engage a new counsel.

Federal Rules of Civil Practice 41 (a) specifically provides that after a defendant has interposed an answer, an action cannot be dismissed on plaintiff's motion except by orders of the court and upon such terms and conditions as the court deems proper. In the present case after the completion of all pre-trial procedures, the calling of the case for trial, the selection of a jury and the taking of the plaintiff's testimony, on the second day of the trial, plaintiff advised the court in chambers that he wished to substitute counsel. No substitute counsel as yet had been employed by the plaintiff. The attorney for the defense advised the court that he had arranged for an out of town witness from Virginia to appear in New York to testify at the trial and therefore could not consent to a mistrial. Counsel for the third-party defendant similarly indicated that he had arranged for two out of town witnesses from New Orleans who were en route to New York. In the circumstances, the trial court advised the plaintiff that it could not grant a mistrial to permit plaintiff to seek new counsel unless the plaintiff agreed to compensate opposing counsel for their time and disbursements. The court thereupon adjourned after which further conferences amongst the counsel and the court were had concerning the possibility of settling the case. The trial then continued without objection of plaintiff to continuing with his original attorney. In passing it should be noted by this court that in this action plaintiff was originally represented by an attorney named Murray Bogatin, represented at trial by Klein, Cohen & Schwartzenberg, the notice of appeal to the Second Circuit was filed by Murray Bogatin, the brief and oral argument were filed and conducted in the Second Circuit on plaintiff's behalf by the firm of Shapiro & Somer. The petition for certiorari has been filed by William F. Mackey, Jr.

We cannot agree with the allegations appearing on page 17 that the petitioner is indigent. Presumably he paid costs of the trial transcript, the printing of the brief in the Second Circuit and the costs of printing the petition herein.

Conclusion.

For the reasons set forth herein it is abundantly clear that neither the trial court nor the Circuit Court is guilty of the misconduct alleged by the petitioner.

The petition herein should be denied.

Respectfully submitted,

DANIEL L. STONEBRIDGE,
Attorney for Respondent,
19 Rector Street,
New York, N. Y. 10006
212 943 3520.

THOMAS H. HEALEY,
Of Counsel.